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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 717

ALFRED H. OSBORNE, ROBERT B. SYMPSON AND PHIL CABBELL,

Petitioners,

vs.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

JOHN T. BARKER,
AMOS T. HALL,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 717

ALFRED H. OSBORNE,

Petitioner,

vs.

J. A. PURDOME, Sheriff of Jackson County, Missouri,

Respondent

ROBERT B. SYMPSON,

Petitioner,

vs.

J. A. PURDOME, Sheriff of Jackson County, Missouri,

Respondent

PHIL CABBELL,

Petitioner,

vs.

J. A. PURDOME, Sheriff of Jackson County, Missouri,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners Alfred H. Osborne, Robert B. Sympson, and Phil Cabbell, respectfully petition for a writ of certiorari to review the decision and final judgment of the

Supreme Court of Missouri, *en banc*, quashing certain original writs of *habeas corpus* theretofore issued by the Supreme Court of Missouri, wherein petitioners had sought to be released from the illegal imprisonment by respondent under the pretext of a commitment for criminal constructive contempt of court issued by the Honorable Thomas R. Hunt, Judge, of Division No. 4 of the Circuit Court of Jackson County, Missouri. The judgment of the Supreme Court of Missouri was rendered on the 10th day of December, 1951, which said judgment became final on the 14th day of January, 1952, by the overruling by that court of petitioners' motion for rehearing (R. 292).

Opinion of the Missouri Supreme Court

The Opinion of the Supreme Court of Missouri, *en banc*, is reported in Alfred H. Osborne, Petitioner, *vs.* J. A. Purdome, Sheriff, Respondent; Robert B. Sympson, Petitioner, *vs.* J. A. Purdome, Sheriff, Respondent; Phil Cabbell, Petitioner *vs.* J. A. Purdome, Sheriff, Respondent, 244 S. W. 2d 1005 (not yet officially reported).

The Opinion of the Supreme Court of Missouri appears at page 267 of this record and is made a part hereof. Petitioners' motion for rehearing appears at page 285 of the record hereof, which motion, by reference, is made a part hereof.

Statement as to Jurisdiction

The jurisdiction of this Court is invoked under subsection 3 of Sec. 1257 of Title 28, Act of June 25, 1948, C. 646, 62 Stat. 929.

Petitioners seek to have reviewed a judgment of the Supreme Court of Missouri rendered in three original *habeas corpus* actions (consolidated by that court (R. 264), reported in 244 S. W. 2d 1005 (not yet officially reported),

wherein the Supreme Court quashed its writs of *habeas corpus* theretofore issued by it. The Supreme Court of Missouri is the highest court of Missouri in which a decision could be had (Constitution of Missouri, 1945, Art. 5, Sec. 2).

The judgment of the Supreme Court of Missouri rendered on the 10th day of December, 1951, denies petitioners' right guaranteed to them by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which petitioners specifically pleaded and raised at the first opportunity in their petition for *habeas corpus* in that court (R. 267-281); the Supreme Court of Missouri, in its Opinion, stated that petitioners invoked the due process clause of the Fourteenth Amendment to the Constitution of the United States but decided it against them (R. 272). Again, in a motion for rehearing, that they were denied due process of law and the equal protection of the law and invoked the Fourteenth Amendment to the Constitution of the United States.

On January 14, 1952, the Supreme Court of Missouri, without further opinion, overruled petitioners' application for rehearing, on which date the judgment became final, and petitioners had exhausted their remedies in that court.

Cases believed to sustain jurisdiction of this Court are:

Tumey v. *Ohio*, 273 U. S. 510;
47 S. Ct. 437, 445;
Cooke v. *The United States*, 267 U. S. 517;
Inland Steel Co. v. *Natl. Labor Rel. Bd.*, 109 Fed. 2d 9.

Preliminary Statement

This case is of great importance to the Bench, the Bar, and the public. It raises the question of trial by contempt. This Court should carefully reexamine all of its former contempt opinions as much confusion exists today.

Petitioners Osborne and Sympson were attorneys of record in the damage suit of *Burton* v. *Moulder*, before Honorable Thomas R. Hunt, one of the ten judges of the Circuit Court of Jackson County, Missouri, on September 27-29, 1950 (R. 1). Petitioner Cabbell is a colored layman, and all three were charged with knowingly, locating, arranging for, coaching, and presenting false testimony in said trial (R. 1-2). Several months after the case had been tried, and while it was on appeal, the said Honorable Thomas R. Hunt, Judge, made a secret one-man grand jury investigation in his own chambers and outside of the presence of petitioners, and without their knowledge, and interviewed witnesses and took statements from them. This is admitted by respondents in their suggestions in opposition to the extension of time filed in this Court on the eighth day of April, 1952, wherein respondent said:

> "The record shows that contemnor Everage did call on Judge Hunt in chambers accompanied by his own lawyer, to give the court information about the case of Burton v. Moulder."

(See also affidavits of Senator William Orr Sawyer and Judge Marion D. Waltner in appendix.) After such secret investigation by said judge, and after he had satisfied himself regarding petitioners, he appointed three Kansas City lawyers as friends of the court to confer with the prosecuting officials regarding the filing of charges. Charges of contempt were then filed in said Circuit Court against the three petitioners and assigned to the same judge for trial, the Honorable Thomas R. Hunt, who had presided at the trial of the damage suit of *Burton* v. *Moulder*, and who had conducted the investigation, as aforesaid. Petitioners believing that said judge was not in a position to disregard what he had previously found in his investigation, and could not therefore give them a fair trial, filed an application alleging

his prejudice, and asked that one of the other nine judges in said county be selected to try said charges. The Constitution of Missouri also provides for the transfer of judges from one court in Missouri to another court, and Judge Hunt could have easily selected another judge to hear said charges; but the said Judge Hunt refused to disqualify himself and refused to call in another judge, although he could have easily done so, but presided to hear the charges of constructive contempt committed out of his presence, perjury or subornation of perjury, and at the conclusion of said trial found all three of the defendants guilty and sentenced them to eight months in the county jail, and also fined petitioners Osborne and Sympson $1,000.

The main witness against petitioners at the trial was Everage, who admitted on cross examination that he had talked to the judge in his chambers before the contempt trial (R. 155-6). The charges were that the petitioners had given money to witness Everage to testify that he saw the collision in the damage suit when, as a matter of fact he had not seen it at all (R. 2). They were charged with perjury or the subornation of perjury in causing witnesses to testify falsely. Petitioners applied for a writ of habeas corpus to the Supreme Court of the State of Missouri which, after hearing and argument, were denied, and certiorari is sought in this court to review said judgments, sending petitioners to jail for offenses committed outside of the presence of the judge, and which, in no wise, interfered with the orderly progress of the trial. Since then petitioner Osborne has been adjudged guilty of two other constructive contempts and sentenced to ten months in jail and also 360 days in jail and fined; that all charges of contempt against him are substantially identical.

The Supreme Court of Missouri held: that the charge against petitioners was criminal contempt—that such proceedings were *sui generis;* that all Courts have the inherent

power to punish for criminal contempt; and no jury trial; that the allegation that Judge Hunt was prejudiced was a mere conclusion; that the statute providing change of venue does not apply to contempt cases; that the complaint was sufficient that petitioners were not charged with perjury but with paying witnesses to give false testimony; (if not perjury or subordination of perjury, what is it); that no other Missouri case can be found involving such a charge; a case of first impression in Missouri; (R. 279).

Questions to Be Decided on Certiorari

This court should lay down definite and specific rules regarding trials by contempt, showing what trials may be conducted by a judge; whether or not the judge who has been offended shall hear the charges; or whether an independent judge shall hear them. These questions are of great importance, and some of the many important questions to be decided in this case are:

(a) Whether or not a trial judge, after verdict, may conduct a secret grand jury hearing to determine the guilt of a lawyer, and then cause charges to be filed against him, and then to hear said charges without a jury, after an application of prejudice has been filed against him, when there were nine other judges available in the county.

(b) Whether a judge before whom constructive contempt has been committed is compelled to hear charges of contempt or can another judge be called in to hear same.

(c) Whether or not jerjury or subornation of perjury is contempt. It is a statutory crime, but is it contempt.

(d) Whether or not trial by contempt is to be substituted in the United States for trial by jury.

(e) Whether or not a lawyer who is alleged to have paid a witness money outside of the courthouse to testify falsely, and where the trial was not delayed or interfered with in any way, shall be tried by contempt

or the matter certified to a grand jury for criminal prosecution.

(f) Whether or not a judge confronted with affidavits of bias and prejudice shall try the case or whether another judge, readily available, should be called in to try it.

Reasons for Granting the Writ

These questions are of the utmost importance to the Bench and Bar of the United States. These lawyers were charged with paying witnesses money to testify falsely, which is either a charge of perjury or subornation of perjury (R. 2). Petitioners were entitled to be tried by a jury on these criminal charges. The judge who did try the case and who did sentence them to jail had tried the damage suit in which the perjury arose. After he investigated the matter, long after the trial was over, he must have been convinced from the testimony of witnesses in his chambers that petitioners were guilty of perjury or subornation of perjury. It could not be otherwise. Being thus convinced, he should have disqualified himself without having the affidavit of prejudice filed. In Missouri the statutes allow affidavits of prejudice to be filed against a judge, and thereupon he shall call in another judge. The Missouri Supreme Court Opinion after holding that the complaints were sufficient against petitioners' attack, and after holding that "purgation by oath" was not the law in the case and never was the law in Missouri, held that no change of venue was permissible in a criminal contempt case, and that the judge before whom the contempt was committed was the proper person to try same, and his was the theory of the trial court; that contempt proceedings are *sui generis* (R. 44-45). There was little if any evidence against petitioner Cabbell except that of association, which was not sufficient to justify his conviction. *State* v. *Bresse*, 326 Mo. 885; *State* v. *Odbur*, 317 Mo. 372;

State v. *Mathis,* 129 S. W. (2) 20. There is no direct appeal in Missouri from a conviction of contempt. The only way to have such a case reviewed by a higher court is by habeas corpus. Other reasons for granting the writ will be assigned in the brief which will accompany this petition.

Prayer

In view of the unsettled law in the United States as to trial by contempt, and in view of the conflict in many courts, petitioners Osborne, Sympson, and Cabbell respectfully pray that a writ of certiorari issue out of this court directed to the Supreme Court of Missouri to the end that said Opinion and Judgment of the Supreme Court of Missouri *en banc* in the said three trials by contempt cases, consolidated as aforesaid, be reviewed by this court, as provided by law, and that upon such review, said judgments of trial by contempt be reversed, and that petitioners, and each of them, have such relief as to this court may seem appropriate.

JOHN T. BARKER,
Macon, Missouri,
Attorney for Petitioners,
Alfred H. Osborne and Robert B. Sympson.

AMOS T. HALL,
107½ North Greenwood Street,
Tulsa, Oklahoma,
Attorney for Petitioner,
Phil Cabbell.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Fourteenth Amendment to the Constitution of the United States Guaranteed Petitioners a Fair Trial Before a Disinterested and Unprejudiced Judge. This They Did Not Get.

Cooke v. *The United States,* 267 U. S. 517, 539;
Inland Steel Co. v. *National Labor Relations Board,* 109 Fed. 2d 9, 20, 21;
In Re Oliver, 333 U. S. 257;
Tumey v. *Ohio,* 273 U. S. 510.

Cooke v. *The United States,* 267 U. S. 517, 539:

> "All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish* v. *The United States,* 299 Fed. 283, 285: *Toledo Company* v. *The United States,* 237 Fed. 986, 988."

Inland Steel Co. v. *National Labor Relations Board,* 109 Fed. 2d 9, 20, 21:

> "That a trial by a biased judge is not in conformity with due process is sustained by the authorities. In *Tumey* v. *Ohio,* 273 U. S. 510, 535; 47 S. Ct. 437, 445; 71 L. Ed. 749; 50 A. L. R. 1243, the court said:
>
> * * * 'No matter what the evidence was against him, he had the right to have an impartial judge. * * *'

The court, in *Jordan* v. *Massachusetts*, 225 U. S. 167, 176; 32 S. Ct. 651, 652; 56 L. Ed. 1038 said: 'Due process implies a tribunal both impartial and mentally competent to afford a hearing. * * * ,,

II

The Affidavits of Prejudice Against Honorable Thomas R. Hunt Did Not State Conclusions But Facts. He Should Have Disqualified Himself and Called in Another of the Many Judges Available.

Cooke v. *The United States*, 267 U. S. 517, 539;

Toledo Newspaper Co. v. *The United States*, 237 Fed. 986, 988;

Schmidt v. *The United States*, 115 Fed. 2d, 394, 397, 398;

State v. *Irbine*, 335, Mo. 261;

State v. *Mitts* (Mo.) 29 S. W. 2d, 125;

Sec. 545.660 *R. S. Mo.* 1949

Toledo Newspaper Co. v. *The United States*, 237 Fed. 986, 988:

"* * * but it is of the greatest importance that contempt proceedings be put, as far as possible, beyond the reach of even unjust adverse criticism, and in such a situation as has been recited, the judges of this court upon whom the duty may fall will always be ready to assign a judge from another district."

Schmidt v. *The United States*, 115 Fed. 2d, 394, 397, 398:

"The judge should not have been required to try the contempt cases while he was confronted with the affidavits of bias and prejudice, to which appellants had appended their certificates of good faith. This is no reflection upon the judge, nor upon any judge so confronted. Even a judge may not put aside the propensity of human nature as easily as he does his robe."

Cooke v. *The United States*, 267 U. S. 517:

> "We think, therefore, that when this case again reaches the District Court, to which it must be remanded, the judge who imposed the sentence herein should invite the senior Circuit Judge of the Circuit to assign another judge to sit in the second hearing of the charge against petitioner."

III

Petitioners Were Entitled to a Trial by Jury Not a Trial by Contempt

Ex Parte Shull, 221 Mo. 623;
Ex Parte Clark, 208 Mo. 121;
People v. *Doss*, 46 N. E. 2d, 984; cert. denied, 320 U. S. 762 (Ill.);
People ex rel Chicago Bar Assn. v. *Nobotny*, 54 N. E. 2d, 536; cert. denied 323 U. S. 734.

IV

The Complaint Is So Vague and Indefinite That It Will Not Support a Judgment of Conviction in Trial by Contempt

Thornhill v. *Alabama*, 310 U. S. 88, 96;
De Jong v. *Oregon*, 299 U. S. 353, 362;
Stromberg v. *California*, 283 U. S. 359, 369.

Stromberg v. *California*, 283 U. S. 369:

> A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

V

Perjury or Subornation of Perjury Is Not Such an Obstruction to the Performance of Judicial Duty as to Constitute Contempt.

In Re Michael, 326 U. S. 227, 228:

> "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact-finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this Court spoke when it decided that perjury alone does not constitute an "obstruction" which justifies exertion of the contempt power and that there "must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty." *Ex parte Hudgings, supra,* 382, 383, 384. And the Court added, "the presence of that element (obstruction) must clearly be shown in every case where the power to punish for contempt is exerted."

Argument

Other cases are discussed throughout the statement and brief. Judge Hunt must have convinced himself of the guilt of the petitioners after his investigation in chambers. When the complaint was filed before him, he should have disqualified himself and called in another judge. There were nine other judges in the county available, and under the Missouri Constitution, judges may transfer from one county to another. There are cases in the books where there is only one judge or one court, but that is not this situation. The charges against petitioners were purely crim-

inal and the judge should have submitted what information he had secured to the grand jury, where petitioners could have been indicted if there were grounds for indictment. Being a criminal case as it was under the Missouri rule, petitioners were clearly entitled to a jury trial. They were charged with a crime, not with interfering with the court. They did nothing to obstruct justice or interfere with the trial. It had been held and concluded many months before these charges were filed. Respondents told this court that one of the witnesses who testified against petitioners, Matt Jones, was shot and killed. Could this judge have cited petitioners for trial for the murder of Matt Jones, and could this judge have sentenced them to death without a jury? Trial by contempt should never be used except in the most rare incident. But when it is used the trial should be before a judge who has no feeling or interest in the matter; one who knows nothing about it. It is not right to require a judge who thinks he has been insulted to try a case against a person whom he thinks has insulted him. A judge, after all, is human. In case of doubt a jury should be called, or the case should be certified to the prosecuting officials for grand jury investigation. A grave injustice has been done petitioners in that they were denied "due process of law" under the Fourteenth Amendment to the Constitution of the United States, and they were likewise denied "the equal protection of the laws." They raised these federal questions at every opportunity and the court decided such questions against them. These men have not had their day in court; they were entitled to a trial, either before a fair and impartial judge or before a jury. They did not get either. Trial by contempt is a dangerous thing and should only be used when some offence is committed in the presence of the judge and which interfered with the orderly progress of the trial. Trial by

contempt should never be substituted for trial by jury. What petitioners are charged with doing is not contempt. They are charged with paying witnesses money away from the courtroom, and out of the presence of the judge, to testify falsely—to commit perjury. This is not contempt—it is perjury or subornation of perjury. It is not punishable by trial by contempt, but punishable under the criminal code. Respondent tells the court that it interfered with the trial. That is hardly possible. If a man can be punished summarily in contempt for bribing witnesses, or paying them to testify falsely, can he be tried by contempt for other criminal offenses such as murder? Suppose, instead of paying a witness to testify falsely, he kills the witness miles away from the courtroom to keep him from testifying. If he can be tried by contempt without a jury for bribing a witness, cannot he be tried in the same way for killing the witness? Petitoners did not commit contempt. If they are guilty, they are not guilty of contempt. They are guilty of a crime punishable by trial in criminal court, with the aid of a jury. Trial by contempt never contemplated anything except offenses interfering with the trial of a case and before the judge.

We have proven in this record beyond a question of a doubt:

That after the trial of the damage suit, Honorable Thomas R. Hunt, Judge, conducted a secret investigation in his chambers by interviewing witnesses and taking statements from them (1) by the testimony of witness Everage in this case (R. 155); (2) by the admissions of respondents in their suggestions in opposition to the extension of time to print the record, wherein they say that the judge interviewed a witness in his chambers; (3) by two affidavits in the appendix of Sawyer and Waltner. Having shown this, how can it be contended that petitioners received a

fair and impartial trial as guaranteed them by the Fourteenth Amendment to the Constitution of the United States?

The Missouri statutes on change of venue are set out in the Appendix.

Conclusion

We respectfully urge this court to grant this writ of certiorari for the reasons set out, and because of the confusion regarding trials by contempt. These men face long terms of imprisonment because they were denied due process of law and equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution of the United States. They were not guilty of contempt. The law of trial by contempt should be clarified. Trial by contempt should not be extended to the bribing of witnesses, assaults or murders outside the presence of the judge. Such criminal acts are not contempt but should be prosecuted as statutory crimes.

Respectfully submitted,

JOHN T. BARKER,
Macon, Missouri,
Attorney for Petitioners Alfred H. Osborne and Robert B. Sympson;

AMOS T. HALL,
107½ North Greenwood St.,
Tulsa, Oklahoma,
Attorney for Petitioner Phil Cabbell.

April 16, 1952.

APPENDIX "A"

AFFIDAVIT

STATE OF MISSOURI,
County of Buchanan, ss:

Senator Wm. Orr Sawyers, of St. Joseph, Missouri, first being duly sworn, upon his oath deposeth and sayeth:

That, he is an attorney at law, and maintains his office in St. Joseph, Missouri; that, in April, 1951, he was employed by Alfred H. Osborne, a lawyer in Kansas City, Missouri, to represent said Osborne in an alleged criminal contempt proceeding then pending in Division 4, of the Circuit Court of Jackson County, Missouri, before the Honorable Thomas R. Hunt, a Judge of said court; that, shortly after affiant was employed by said Osborne, affiant learned that said Hunt had secretly interviewed witnesses, including Vernon Everage, in said proceeding in the chambers of said Hunt; that, at least at some interviews of said witnesses, said Hunt had had a stenographer present to make a record of such interviews.

That, in May, 1951, and before the trial of said contempt proceeding before said Hunt in June, 1951, affiant and Senator John Hosher, of Savannah, in Andrew County, Missouri, went to the chambers of said Thos. R. Hunt at which time affiant told said Hunt that affiant had learned of said interviews and the transcription made thereof, and requested said Hunt to furnish affiant with a copy of such transcriptions at affiant's expense.

That, thereupon, said Hunt became quite red-faced, and apparently embarrassed, and stated that said interviews were his private investigation, that they were not part of any public proceeding, that said Osborne was not entitled to such transcriptions, and said Hunt very curtly refused affiant's request for copies of such interviews.

(Signed) WM. ORR SAWYERS.

Subscribed and sworn to before me, this 1st day of April, 1952.

(Signed) RUTH BAUMAN,
Notary Public.

[SEAL.]

My Commission expires Feb. 16, 1955.

APPENDIX "B"

AFFIDAVIT

STATE OF MISSOURI,
County of Jackson, ss:

Marion Waltner, former Judge of the Circuit Court of Jackson County, Missouri, at Independence, resident of Kansas City, Missouri, with offices at 600 National Fidelity Life Building, 1002 Walnut St., Kansas City, Missouri, first being duly sworn according to law, upon his oath, deposeth and sayeth:

That on, April 6th, 1951, he received a telephone call from Mrs. Vernon Everage, to the effect that her husband, Vernon Everage, had been arrested, and that she wanted affiant to represent said Everage; that said said Everage was to be taken to the office of the Prosecuting Attorney of Jackson County, Missouri, the next morning, April 7th, 1951; that, on the morning of April 7th, 1951, affiant went to the office of Henry H. Fox, Jr., Prosecuting Attorney of Jackson County, Missouri, and told said Fox that affiant wanted to talk to Vernon Everage, whereupon said Fox said that it was all right with him (Fox) to talk to Everage, that he, Fox, had no objection to affiant's talking to said Everage, but that Judge Hunt, who was then with Fox, was going to talk to Everage then, and that affiant could talk to Everage after that; that, for that reason, affiant was not permitted to talk to said Everage; that, very shortly after affiant talked to Fox, they, Hunt and Everage, left the office of Prosecuting Attorney together.

That, very shortly thereafter, affiant was advised by said Helen Everage that her husband would not need affiant's services for he had another lawyer.

(Signed) MARION WALTNER.

Subscribed and sworn to before me, this 2nd day of April, 1952.

(Signed) PEARL H. RICKETTS,
(SEAL.) *Notary Public.*

My Commission expires February 16, 1955.

APPENDIX "C"

REVISED STATUTES OF MISSOURI, 1949

478.463. Circuit court of Jackson county—divisions.—The circuit court of the county of Jackson, comprising the sixteenth judicial circuit, shall be composed of ten divisions and a judge shall be selected to preside over each division. Divisions numbered one to nine, inclusive, shall sit at the city of Kanas City and the Independence division of said court shall sit at the city of Independence. (1949 S. B. 1140 § 478.463)

(Note: Sections 478.463 and 478.467 as enacted in 1949 Senate Bill 1140 represent a combination of the following enactments and the constitutional provision specified: Law 1871, p. 28 § 4 as amended Laws 1879 p. 80; Laws 1889 p. 76, Laws 1901 p. 117, Laws 1905 p. 121, Laws 1907 p. 201 and Laws 1913 p. 211 §1.)

478.500. Judge of other division to hold court, when.—Whenever the judge of any division of said circuit court shall be sick, absent, or, from any cause, is unable to hold any term or part of term of court in such division, or his regular term at Independence, such term, or part of term, may, by request of such judge of such division, be held by a judge of any other division of said circuit court; and if such judge fail to make such request, or if the judge so requested, for any reason, fail to hold such term, or part of term, of court in such division, or his regular term at Independence, then the attorneys of court may, in the manner provided by general law, elect one of their members possessing the necessary qualifications to hold court in such division, or at Independence, for the occasion. (L. 1913 p. 211 §5)

545.650. Change of venue and disqualification of judges in multiple-judge circuits.—In all circuits composed of a single county having more than one judge, no change of venue shall be allowed by said circuit court to the circuit court of any other county in this state for the cause that the judge sitting for the trial of said suit is prejudiced, nor for the cause that the opposite party has undue influ-

ence over the judge, but if any such legal objection is made to try any case, then such case shall be transferred to another division of said circuit court presided over by a different judge. Only one such application shall be made by the same party in the same case, and shall be made as to only one of the judges of said court. (2232, A. 1949 H. B. 2142)

545.660. When judge deemed incompetent to try case.—When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases:

(1) When the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or,

(2) When the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or,

(3) When the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or,

(4) When the defendant shall make and file an affidavit supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial. (4037)

556.010. Criminal offense defined.—The terms "crime," "offense," and "criminal offense," when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted. (4867)

476.140. Commitment for contempt to set forth particulars.—Whenever any person shall be committed for any contempt specified in this chapter, the particular circumstances of his offense shall be set forth in the order or warrant of commitment. (2031)

545.240. Informations—how filed, verified, endorsed.—Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation,

of the court having jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be endorsed on the information, in like manner and subject to the same restrictions as required in case of indictments. (3894)

545.280. Prosecuting witness, who deemed.—When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 545.250, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be endorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case. (3900)

1 Mo. Territorial Laws 8, "Act of Congress, Approved June 4, 1812."—"No man shall be deprived of life, liberty, or property but by judgment of his peers and the law of the land."

Constitution of Missouri, 1945, Article I, Section 22 (a). Right of trial by jury—qualifications of jurors—two-thirds verdicts.—That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive

a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.

Article V, Section 15. Judicial circuits—establishment and changes—authority of judges—general term and divisions.—The state shall be divided into convenient circuits of contiguous counties. In each circuit there shall be at least one judge. The circuits may be changed or abolished by law as public convenience may require, but no judge shall be removed thereby from office during his term. Any circuit judge may sit in any other circuit at the request of the judge thereof. In circuits composed of a single county and having more than one judge, the court may sit in general terms or in divisions.

Source: Const. of 1875, Art. VI, §§24, 27, 28, 29.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 717

ALFRED H. OSBORNE,
Petitioner,

vs.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI,
Respondent

ROBERT B. SYMPSON,
Petitioner,

vs.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI,
Respondent

PHIL CABBELL,
Petitioner,

vs.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI,
Respondent

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC, AND BRIEF IN SUPPORT THEREOF.

AMOS T. HALL,
107½ N. Greenwood,
Tulsa, Oklahoma,
Counsel for Petitioner,
Phil Cabbell.

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SUPREME COURT OF THE UNITED STATES

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ALFRED H. OSBORNE,
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PHIL CABBELL,
Petitioner,

vs.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI,
Respondent

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Phil Cabbell, respectfully files this Supplemental Petition For a Writ of Certiorari, directed to the Supreme Court of the State of Missouri, en banc, to review

a judgment of said court in their separate original Habeas Corpus actions, entitled, In re *Alfred H. Osborne, Petitioner,* v. *J. A. Purdome, Sheriff of Jackson County, Missouri, Respondent; In re Robert B. Sympson, Petitioner,* v. *J. A. Purdome, Sheriff of Jackson County, Missouri, Respondent; In re Phil Cabbell, Petitioner,* v. *J. A. Purdome, Sheriff of Jackson County, Missouri, Respondent,* all of which actions, by order of the Supreme Court of Missouri, had been consolidated, wherein the Supreme Court of Missouri quashed the Writs of Habeas Corpus therefore issued by said court.

This supplemental petition and brief in support hereof is merely supplemental to the petition filed in behalf of all petitioners by The Honorable John T. Barker, of Macon, Missouri. With the parties in one city and their respective counsel in other cities, the time and expense of travel has rendered impossible the close cooperation and collaboration desirable in a joint petition. Herein petitioner Cabbell prays the indulgence of the Court in presenting additional matters not covered in the original petition and brief.

Summary Statement

On the 27th day of April, 1951, an unverified document called a "complaint for Criminal Complaint" entitled, *State of Missouri, ex inf., Henry H. Fox, Jr., Prosecuting Attorney of Jackson County, Missouri, Informant and Complainant, vs. Alfred H. Osborne, Robert B. Sympson, J. Carl James, Phil Cabbell, Matt Jones and Vernon Everage, Contemnors,* was filed in the office of the Circuit Clerk of Jackson County, Missouri, and thereupon, by an order reciting that only Division No. 4, of the Circuit Court of Jackson County, Missouri, had jurisdiction to entertain proceedings to punish the contempt alleged (R. 1, 2, 3) was assigned to Division 4 of said court.

The essence of the charge is briefly stated in that part of the complaint which charges:

> "That, in the course of preparing for and during the trial of the case of *Burton v. Moulder,* (a personal injury suit tried in Division No. 4, of the Circuit Court of Jackson County, Missouri, September 27-30, 1950, before the Honorable Thomas R. Hunt, Judge, in which petitioners Osborne and Sympson were attorneys for the plaintiff) * * * (all of the accused) did confederate and did unlawfully act to impede and obstruct the administration of justice by * * * undertaking to present to whatever jury that might be drawn for the actual trial of the case, and by actually presenting, the testimony of two alleged witnesses who in truth and fact had never actually witnessed any of the occurrences out of which the lawsuit of *Burton v. Moulder* arose. * * * (R. 1, 2)
>
> "Each of the named contemnors had full knowledge of the aforesaid plan and the individual conduct of each, standing alone, constituted an action which was designed to and which did impede and obstruct the administration of justice." (R. 2)
>
> That the accused "* * * did individually act to impede and obstruct the administration of justice * * *."
>
> That "* * * the conduct (of the accused) tended to interfere and did in fact * * * impede the administration of justice * * * in this court." (R. 2).

On the 25th day of May, 1951, these petitioners, and the other accused appeared, and the trial of said alleged criminal contempt proceeding based upon alleged perjury and alleged subornation of perjury committed in the trial of said *Burton* v. *Moulder* was begun. On the 18th day of June, 1951, the Honorable Thomas R. Hunt, Judge of Division 4, of the Circuit Court of Jackson County, Missouri, made and entered a judgment, finding petitioners guilty of contempt of court, sentencing them to 8 months in the county jail, and

in addition thereto, fined petitioners Osborne and Sympson $1000 each, a certified copy of which was to be a commitment.

By appropriate pretrial motions, which were incorporated in, and renewed in post trial motions, objections to the admission of extraneous evidence, and objection to the competency of the undispensable witness, (R. 26; 197-206) the questions of due process of law and equal protection of the law under Section 1, Amendment XIV of the Constitution of the United States were raised in, and overruled by the trial court.

By the trial court, no ground was given as the basis for any of said rulings. Before the ruling upon petitioners' separate motions for the substitution of an impartial judge, denominated "Petition For Change of Venue" or "Application and Affidavit For Change of Venue", the only reason advanced as a basis therefor by the *amici curiae*, was the same reason given in the order of assignment, namely, that only the judge before whom the alleged contempt was committed had the power to hear and punish the alleged contempt. That,

> *"It is therefore apparent, your honor, that this Court has no option but to hear this case. The question of whether this court is, or is not prejudiced is not an issue nor can it be an issue. If this Court desired to send it elsewhere, it is not within its power to do so."* (R. 44-47.) (Emphasis ours.)

Because, under the decisions of the Supreme Court of Missouri, judgments in constructive criminal contempt proceedings are not subject to review by appeal, or writ of error, but may be reviewed only by the common law Writ of Habeas Corpus, on the 20th day of June, 1951, petitioners hereon filed in the Supreme Court of Missouri, their separate original Habeas Corpus actions wherein petitioners, by duly verified answers to respondent's return, presented to the Supreme Court of Missouri, the same questions theretofore presented to the trial court. (R. 237-262.)

On December 10, 1951, when the Supreme Court of Missouri, in its opinion herein of that date, ruled contrary to its own prior decision in *State ex rel. McAllister* v. *Slate,* 278 Mo. 570, 214 S. W. 85, 87, that the allegation, in each petitioner's verified answer to respondent's return, "That said Honorable Thomas R. Hunt was, in fact, prejudiced," to which respondent had demurred, was a *mere conclusion,* and not an ultimate fact admitted by respondent's demurrer (R. 276-277), petitioners herein, *ipso facto,* were denied any opportunity of a hearing upon their claim of a denial of their federal right under Section 1, Amendment XIV, Constitution of the United States, to a fair, impartial and unprejudiced judge.

Thus, in petitioner's Motion for Rehearing (paragraph 2, R. 287), the attention of the Supreme Court of Missouri was directed to the fact that in *State ex rel. McAllister* v. *Slate, supra,* said court had ruled, where almost an exact replica of the allegation of prejudice was denied, an issue of fact was created, a commissioner was appointed, proof adduced and the charge of prejudice so made against the circuit judge was sustained; that, in the case at bar, when said court ruled said allegation of prejudice was a mere conclusion not admitted by respondent's demurrer to said answer, petitioners herein were thereby not only denied the benefit of what they contend is respondent's admission that Judge Thomas R. Hunt was not impartial, but petitioner's were denied an opportunity to prove such ultimate fact, as was accorded relator in the *Slate* case, on substantially the same allegation.

Jurisdiction Statement

In the original petition herein, the jurisdictional statement, we believe, fully complies with the rules of this court

and is herein adopted, but we should like to cite one further case in support of this Court's jurisdiction, towit:

Young v. *Ragen,* 337 U. S. 235, 69 S. Ct. 1073, — L. Ed. —.

Misstatements in Opinion

The opinion of the Supreme Court of Missouri erroneously states that "Sympson, in the presence of Cabbell, told him" (Everage) that Cabbell "was acting out the part of the Ford that got hit." This statement is not true (R. 78-80). What Sympson told Everage is not only untelligible, but is not binding on Cabbell, and Everage's conclusion that "* * * Cabbell's car was to have been the Ford, etc." (R. 79), was objected to, and on motion, was stricken (R. 78-80).

Everage, the only witness who mentioned Cabbell, testified that Cabbell was in a car parked near the Everage home Wednesday night when Everage talked to Osborne and Sympson, but Cabbell did absolutely nothing and said nothing: *he was merely present* (R. 72, 73, 74, 75).

On Thursday morning, Cabbell was at the scene of the accident in a car (R. 76, 78, 79, 80, 101), but the conclusion of Everage as to what Cabbell was doing (R. 78) was stricken (R. 79-80). The witness could not remember any conversation, if any there was, on the part of Cabbell (R. 79, 80). *Again, Cabbell was merely present.*

Nor had Everage pleaded guilty at the time he testified, as erroneously stated in said opinion. His response (R. 21, 22) was not a plea of guilty. No disposition of the cause as to Everage, and no finding of his guilt was made until the close of the trial (R. 26). The trial Court admitted certain evidence, and limited its applicability to Everage upon the theory that Everage's guilt was not necessarily established by his own testimony (R. 168, 169).

Substantial Questions

Today the nation is being swept by an epidemic of contempt of court cases, both direct and constructive. Many such cases, as here, represent an attempt to substitute criminal contempt proceedings for the process of ordinary criminal prosecution. Such attempt renders it imperative to the bench, the bar, and the public that it be determined to what extent the courts of the nation, including the Courts of Missouri, may make their own personal and secret investigation, including interviewing witnesses, appoint their own special prosecutors, formulate a state of facts in somewise touching the administration of justice coupled with the conclusion that said facts impede and obstruct the administration of justice, and initiate prosecution thereof under a designation of constructive criminal contempt proceedings and thereby sweep aside all common law, statutory and constitutional safeguards, such as, impartial judge, change of venue, severance, competency of witnesses, jury trial, appeal, writ of error, or statute of limitaitons, without violating the rights of American citizens, including citizens of Missouri, under Section 1, Amendment XIV of the Constitution of the United States.

A diligent search for a claimed violation of rights under Section 1, Amendment XIV, Constitution of the United States, under similar circumstances has been made, but no decision thereon has been found. For these reasons, it is believed that the questions in this case are substantial. *Brinkerhoff-Faris Trust and Saving Co.* v. *Hill,* 280 U. S. 647, 50 S. Ct. 451, 74 L. Ed. 1107; *Zucht* v. *King,* 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

Questions Presented

In a constructive criminal contempt proceeding, which in the State of Missouri, is not subject to review by appeal or

writ of error, were the petitioners herein denied due process of law and the equal protection of the law, as guaranteed by Section 1, Amendment XIV, of the Constitution of the United States:

(1) By the overruling and denying of petitioners' motions and affidavits for a change of judge, and petitioners thus and thereby unreasonably and arbitrarily deprived of the right afforded to all other litigants similarly situated in both civil and criminal proceedings by the laws of Missouri, upon like petitions, motions and affidavits, to obtain a change of judge, where the regular judge of a circuit court is disqualified because of prejudice?

(2) By being required to proceed with the trial of said criminal contempt proceeding before a judge, the Honorable Thomas R. Hunt, who was, in fact, prejudiced, who had presided at the said trial of *Burton* v. *Moulder,* wherein the alleged perjury and alleged subornation of perjury charged therein as contemptuous conduct purportedly occurred, which said judge had peremptorily granted a post trial motion in said *Burton* v. *Moulder* setting aside the jury verdict, and summarily entered judgment for defendant, and who thereafter conducted his own private and secret investigation in which he interviewed witnesses and recorded his interviews of witnesses,—the contents of which secret interviews said judge refused to divulge to petitioners, and which said judge had, in fact, through the device of *amici curiae,* appointed special prosecutors, through whom he directed and controlled said proceeding from its inception to its conclusion?

(3) When the Supreme Court of Missouri ruled that their allegation "That said Honorable Thomas R. Hunt was, in fact, prejudiced against petitioner, and in said cause, and was not wholly unprejudiced" was a conclusion, and not an ultimate fact admitted by respondent's demurrer, thereby

depriving petitioners of any opportunity to present evidence in support of their claim of a denial of their federal right, i. e., an impartial judge?

(4) When deprived of their liberty and property by a judgment and commitment upon a charge not made (contempt), and upon evidence (of perjury and subornation of perjury) that does not sustain the charge attempted to be made (contempt of court)?

(5) By being denied the procedural safeguards, towit, jury trial or trial upon a verified answer, that concurrently developed with the inherent contempt power alleged unalterably "frozen" in the courts of record of Missouri, by the constitutional provision creating said courts, when said procedural safeguards were in specific language likewise "frozen" in every constitution adopted by Missouri, in the very language of the Magna Carta, i. e., "No man shall be deprived of his life, liberty or property but by the judgment of his peers *and* the law of the land."

Reasons Relied upon for Allowance of the Writ

The Writ should be issued in this case because the decision of the Supreme Court of Missouri arbitrarily and unreasonably denies petitioners due process of law and equal protection of the law, as guaranteed to them by Section 1, Amendment XIV of the Constitution of the United States for the following reasons:

1. Because, the Supreme Court of Missouri, while giving "lip service" to the proposition that failure of a judge, who could not give the accused an impartial trial, to call in another judge, would constitute a denial of due process (R. 277), ruled, contrary to its own prior decision in *State ex rel. McAllister* v. *Slate, supra,* that petitioner's allegation "That said Honorable Thomas R. Hunt was, in fact, prejudiced against his petitioners, and in said cause was

not wholly unprejudiced'' was a mere conclusion, not an ultimate fact admitted by respondent's demurrer, and looked to the ''cold'' record of the contempt proceeding where the *amici curiae,* said *''The question of whether this court is, or is not prejudiced is not an issue nor can it be an issue.''* (R. 45—Emphasis ours) to determine whether said judge was prejudiced, thereby deprived petitioners any hearing whatsoever upon their claim of a denial of their federal right, i. e. to a fair, impartial and wholly unprejudiced judge, in direct contravention to the ruling of this Court that state appellate courts, in some manner, must accord petitioners a hearing upon their claim of a denial of their federal rights in *Young* v. *Ragen,* 337 U. S. 235, 69 S. Ct. 1073.

2. Because, when petitioners' motions for an impartial judge were overruled and denied, they were arbitrarily and unreasonably deprived of the right afforded by the laws of the State of Missouri all other litigants similarly situated in both civil and criminal proceedings, upon like petitions, motions and affidavits, to obtain a change of judge, where the regular judge of a circuit court is disqualified because of prejudice.

State ex rel. v. *Waltner,* 350 Mo. 1021; 169 S. W. (2) 697;
Power Mfg. v. *Saunders,* 274 U. S. 49; 47 S. Ct. 678, 679;
State v. *Irvine,* 335 Mo. 261, 72 S. W. (2) 96;
Skinner v. *State of Oklahoma,* 316 U. S. 535; 62 S. Ct. 1110, 1112.

3. Because, the decision of the Supreme Court of Missouri has decided a Federal question of substance not heretofore determined by this court in a way not in accord with the applicable decisions of this court.

Tumey v. *Ohio,* 273 U. S. 510, 47 S. Ct. 437; 445;
Ragen v. *Young,* 337 U. S. 235; 69 S. Ct. 1973.

4. Because petitioners are deprived of their liberty and property by virtue of a judgment and commitment finding them guilty of contempt, whereas the complaint does not charge them with contempt but only with perjury and subornation of perjury, which do not constitute contempt.

Ex parte Creasy, (en banc), 243 Mo. 679; 148 S. W. 914, 921, 924;
In re Michael, 326 U. S. 224; 66 S. Ct. 78;
U. S. v. *Goldstein,* 158 Fed. (2) 916, 920.

(5) Because petitioners are deprived of their liberty and property by virtue of a judgment and commitment finding them guilty of contempt, upon evidence that shows perjury, and subornation of perjury, alone, which does not constitute contempt. (See cases under 4.)

As to petitioner Phil Cabbell:

The evidence, as to Cabbell, shows only mere presence, which is not sufficient in law to fix criminal responsibility, or to constitute "aiding and abetting".

State v. *Bresse,* 326 Mo. 885; 333 S. W. (2) 919;
State v. *Odbur,* 317 Mo. 372, 295 S. W. 734;
State v. *Simon,* 57 S. W. (2) 1062; NOR.

Prayer

WHEREFORE, petitioner Cabbell for the reasons stated herein and in the original petition prays for the relief therein sought.

AMOS T. HALL,
107½ N. Greenwood Street,
Tulsa, Oklahoma,
Attorney for Petitioner,
Phil Cabbell.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Section 1 of Amendment XIV, Constitution of the United States guarantees to petitioners both due process of law and equal protection which includes a fair and impartial judge in all proceedings, including construction criminal contempts.

A. Constitutional and statutory policy of the state of Missouri, is to afford every litigant a fair and impartial judge.

(1) Any circuit judge in this state could, on request, have held court in said Division No. 4.

Article V, Sec. 15, Constitution of Missouri;
State v. *Emerich*, 237 SW (2) 169, 172; NOR;
Sections 11.01, 11.02, 11.03, 11.04, of Rules of Supreme Court of Missouri.

(2) Circuit Court of Jackson County, Missouri is one court composed of ten divisions and ten regular judges;
Section 478.463 Revised Statutes of Missouri, 1949;
State v. *Howard*, 205 SW (2) 530, 532.

(3) The proceeding could have been transferred to another division, or any judge of said court could have held court in said Division No. 4 on request of Judge Hunt.

Section 545.650, Revised Statutes of Missouri, 1949;
Section 478.500, Revised Statutes of Missouri, 1949.

(4) The substitution of another judge is not a change of venue.

State ex rel. McAllister vs. Slate, 278 Mo. 570; 214 S. W. 95, 87;
State ex rel. Renfro vs. *Wear*, 129 Mo. 619; 31 S. W. 608.

(5) Due process, as declared by the legislative enactments, entitles all litigants in Missouri to a fair and impartial judge.

A. As to Civil Actions.

Sec. 508.090, Revised Statutes of Missouri, 1949;
Sec. 508.130, Revised Statutes of Missouri, 1949;
State ex rel. K. C. Public Service Co. v. *Waltner,* 350 Mo. 1021; 169 S. W. (2) 697.

B. As to Criminal Prosecution.

Section 546.660 Revised Statutes of Missouri, 1949;
Section 556.010, Revised Statutes of Missouri, 1949;
Section 476.120, Revised Statutes of Missouri, 1949;
State v. *Irvine,* 335 Mo. 261, 72 SW(2) 96, 100.

C. Criminal Contempts are "criminal prosecution" within the meaning of Missouri's statutory scheme, embodied in Section 546.660, Revised Statutes of Missouri 1949, for Section 556.010, R. S. of Mo. 1949, provides:

> "The term 'crime', 'offense' and 'criminal offense', when used in this or *any other statute,* shall be construed to mean *any offense,* as well misdemeanor as felony, for which any punishment by imprisonment or fine, may by law be inflicted." (Emphasis ours)

And Section 476.120, R. S. of Mo. 1949 prescribes the penalty of fine and imprisonment for contempt.

Section 476.140, R. S. of Mo. 1949, designates contempt of court as *an offense.*

D. Denial to petitioners, under the circumstances, of the benefits of the statutory method of securing an impartial judge constituted an unreasonable and arbitrary denial of equal protection of the law.

Power Mfg. Co. v. *Saunders,* 274 U. S. 49; 47 S. Ct. 678, 679;
Skinner v. *State of Oklahoma,* 316 U. S. 535, 62 S. Ct.

II

A judgment and commitment based upon a charge (contempt) not made, and not sustained by the evidence is a denial of due process under Section 1, Amendment XIV, Constitution of the United States.

A. Complaint charges perjury and subornation, not contempt—

(1) Perjury and subornation of perjury are not contempt—

(a) *In re Michael,* 326 U. S. 224, 227;

(b) *Ex Parte Creasy,* 243 Mo. 679, 148 S. W. 914.

(2) Any charge, in complaint, other than perjury and subornation of perjury is so vague, so indefinite and so uncertain that it is tantamount to no charge at all, and a conviction thereon violates due process.

(a) *Thornhill* v. *Alabama,* 310 U. S. 88; 60 S. Ct. 736, l. c. 741;

(b) *De Jonge* v. *Oregon,* 299 U. S. 353, 57 S. Ct. 255, 259; 81 L. Ed. 278;

(c) *Stromberg* v. *California,* 283 U. S. 359, 367, 368; 51 S. Ct. 532; 75 L. Ed. 1117.

B. Evidence shows only perjury and subornation of perjury, not contempt.

(1) As to Cabbell, the evidence shows mere presence which is clearly insufficient to fix criminal responsibility upon Cabbell for any offense.

State v. *Bresse,* 326 Mo. 885; 333 S. W. (2) 919;
State v. Mathis, 129 S. W. (2) 20; NOR.

Respectfully submitted,

AMOS T. HALL,
107½ Greenwood Street,
Tulsa, Oklahoma,
Attorney for Petitioner,
Phil Cabbell.

APPENDIX

Rules of the Supreme Court

11.01—Transfers, When Made. Under Section 6 of Article 5 of the Constitution the Supreme Court may temporarily transfer a judge of any appellate or circuit court, with the consent of such judge, to any other appellate or circuit court:

(a) When an appellate court or circuit court requests the transfer of a judge to it; or

(b) When the Supreme Court finds the administration of justice requires such transfer and orders same.

11.02—Powers of Transferred Judges. A judge so transferred, during the period designated shall possess the same powers and be liable to the same responsibilities as a judge of the court to which he is transferred.

11.03—Chief Justice to Receive Copy of Request from Circuit Judge. A circuit judge requesting another circuit judge to sit in his circuit under Section 15 of Article 5 of the Constitution shall send a copy of such request to the Chief Justice of the Supreme Court.

11.04—Court Held With Regular Judge or Separately. Circuit Judges, sitting either by request of the regular judge or by transfer order of the Supreme Court, may hold court in the same county and at the same time either with or separately from the regular judge or judges of the circuit.

Pertinent Statutes

For the pertinent statutes herein referred to see Appendix to original petition and brief in support thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 717.

ALFRED H. OSBORNE, ROBERT B. SYMPSON AND PHIL CABBELL, PETITIONERS,

v.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF OF J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI, RESPONDENT, IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Missouri (R. 267) is reported at 244 S. W. 2d 1005. (It has not yet been officially reported in the Missouri Reports.)

JURISDICTION

The judgments of the Supreme Court of Missouri were entered on December 10, 1951 (R. 265, 266) and a petition for rehearing was denied on January 14, 1952 (R. 292). On April 9, 1952, Mr. Justice Clark entered an order

extending the time for filing a petition for certiorari to and including April 19, 1952 (R. 300) and the petition was timely filed. The motion for an extension was resisted for the reasons stated in suggestions filed with the Clerk.

Jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States require the State of Missouri to provide a jury trial in common law constructive contempt proceedings, or is procedural due process afforded by an adversary proceeding which includes a hearing before a judge without a jury after notice and with full opportunity to defend?

2. Was the trial judge constitutionally disqualified from hearing and determining the case because, before the institution of a contempt proceeding, he had received unsolicited information relating to the trial of an earlier case in his court from one of the witnesses in that earlier case, who had, without invitation, called upon the trial court on the advice of and in the company of his own attorney?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *

STATEMENT

Petitioners are three of six persons who were named as contemnors in a complaint for criminal contempt filed against them by the Prosecuting Attorney of Jackson County, Missouri, in the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri (R. 1-3).

Before the contempt proceeding was commenced, one Vernon Everage, who subsequently was charged and adjudged guilty of contempt, called upon Judge Hunt, the judge who ultimately tried the contempt proceeding, in his chambers, without invitation and solely on the advice of and in the company of his own personal attorney, to give to Judge Hunt certain information concerning an earlier case tried before Judge Hunt in which said Everage had been a witness (R. 155). Judge Hunt, upon the basis of that information, on April 12, 1951, appointed *Amici Curiae* (R. 51).

The order of appointment recited that it appeared "from information brought to the attention of the court that contemptuous acts and conduct *may* have been practiced by certain lawyers, officers of this court and others" (R. 51)[1] in connection with the trial of the damage suit entitled *Burton* v. *Moulder,* which was the earlier case tried in September, 1950 (R. 1).

Eleven days after their appointment, *Amici Curiae* reported to Judge Hunt that they had "investigated the information furnished them by the court upon which the court was moved to make their appointment"; that they had "conducted an additional factual investigation" (R.

[1] The word "*may*" is our italics to call attention to the fact that from the outset, Judge Hunt did not order a prosecution. His order recognized only that grounds for investigation existed. Similar italicism in the various pretrial orders of Judge Hunt that will be immediately referred to in the statement are also ours to emphasize the same fact.

52); that they had investigated the law; and that from their investigation of the facts and the law, they believed that "reasonable cause exists for the institution of a criminal contempt proceeding" (R. 53).

Judge Hunt, upon receiving the report, ordered *Amici Curiae* "to represent and serve this court and to assist in the representation of the State of Missouri in all proceedings of criminal contempt that *might* be instituted" (R. 53). *Amici Curiae* were ordered to confer and advise with the Prosecuting Attorney, the *ex officio* legal representative for the State of Missouri in Jackson County, Missouri, regarding their report (R. 54).

Judge Hunt's order specifically provided that "should the said *Amici Curiae* and the said Henry H. Fox, Jr., Prosecuting Attorney, conclude and agree that reasonable cause exists for the institution of criminal contempt proceedings * * * that those persons, all acting in their official capacities, shall *thereafter* proceed to institute and prosecute such action or actions as are authorized by law" (R. 54).

Judge Hunt's order also expressly provided that "should they conclude no reasonable cause exists, then such conclusion shall be duly reported to this court" (R. 54). His order further stated that "this court is mindful of the broad power that the law vests in it and specifically requires that no proceeding be filed or maintained that does not advise any accused of the charges that *might be* brought against him and afford to him the right to have a reasonable opportunity to meet those charges by way of defense or explanation. Any such proceedings, *if any such proceeding be filed,* shall also afford any accused the right to be represented by counsel * * * " (R. 54).

Petitioners' repeated assertions that Judge Hunt "made a secret one-man grand jury investigation * * * and interviewed witnesses and took statements from them" (Pet. 3) (The page references to the Petition and to Petitioners' Brief are to the typewritten copy thereof. Respondents have not yet been served with printed copies of anything except the printed record which was served on the last service day); that "after he (Judge Hunt) had satisfied himself regarding petitioners," he appointed *Amici Curiae* to confer with the Prosecuting Attorney "regarding the filing of charges" (Pet. 4); that he conducted "a secret grand jury hearing" (Pet. 6); that Judge Hunt "must have been convinced from the testimony in his chambers that petitioners were guilty * * * it could not be otherwise" (Pet. 6); that "Judge Hunt must have convinced himself of the guilt of the petitioners after his investigation in chambers" (Pet. Br. 3); and that petitioners "have proven in this record beyond the question of doubt" that Judge Hunt "conducted a secret investigation in his chambers by interviewing witnesses and taking statements from them" (Pet. Br. 5), are completely without support in the record or outside the record. They are expressly contrary to the record.

The effort to supply proof "beyond a reason of a doubt" (Pet. Br. 5) by "the admissions of respondents in their suggestions in opposition to the extension of time" (Pet. Br. 5) is frivolous and is reminiscent of petitioners' effort in the Supreme Court of Missouri to prove Judge Hunt was, in fact, prejudiced by the so-called "admission" inherent in a demurrer to a pleading which pleaded that conclusion of law (R. 276).

In our suggestions in opposition to the time extension we pointed to the record to show the facts as to Everage's uninvited call on Judge Hunt in the company of his own

lawyer (see page 2 of Suggestions in Opposition to Petitioners' Motion for Extension of Time and the pages of the Record referred to therein (R. 155)).

The affidavit of Senator Sawyers, attached to petitioners' brief, shows that petitioners were fully informed of the fact and circumstances of Everage's call long before trial. Sawyers has been counsel of record for petitioners since the outset of this case (see page 97 of typewritten transcript of Missouri Supreme Court record) and until at least April 23, 1952, when the stipulation for printing the record in this Court was executed (R. 300).[2]

The record clearly shows that petitioners have not professed to believe, until now, that Everage's call on Judge Hunt in the company of his own lawyer amounted to a "one-man grand jury investigation" or that Everage's and his attorney's call in any way was calculated to, or did in fact, prejudice Judge Hunt against them. That call was, until papers were filed in this Court, viewed by the staff of defense counsel as merely the incident which directed attention to the possibility that justice may have been obstructed in the trial of *Burton* v. *Moulder*.

The complaint for criminal contempt was ultimately filed with the Clerk of the Circuit Court of Jackson County, Missouri, at Kansas City (R. 1). That court sits in ten divisions. (See Sections 478.463, R. S. Mo. 1949 *et seq.*). The Presiding Judge of the court *en banc* is also the Judge of the Assignment Division and in charge of the assignment of all cases to one of the nine divisions in Kansas City.

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[2] Mr. McLaughlin, who was chief defense counsel until "illness * * * and * * * a highly nervous condition" prevented him from having the record prepared for this Court (See Petitioners' Motion for Extension of Time), announced early to the trial court that the view he had "taken of the case has resulted in a decision not to apply for a legislative continuance" (See page 97 of typewritten transcript and see also Section 510.120 R. S. Mo. 1949 for grounds of legislative continuance). Senator Sawyers, however, was not dropped from the staff of defense counsel until the petition for certiorari was filed in this Court.

Immediately after the case was filed, the Presiding Judge ordered the cause assigned to Division 4, Judge Hunt's division, "because the law is well settled that the court alone in which a contempt is committed, or whose authority is defied, has power and jurisdiction to punish it or to entertain proceedings to that end, and because no other court has any jurisdiction or power in such cases" (see page 5 of typewritten transcript of Missouri Supreme Court). The language quoted from that order was directly quoted by the Presiding Judge from the decision of the Supreme Court of Missouri in *State ex inf. Crow, Atty. Gen.*, v. *Shepherd*, 177 Mo. 205, 237, 76 S. W. 79, a decision which the Circuit Court was constitutionally obliged to follow. See Section 2 of Article V of 1945 Missouri Constitution. See also argument of counsel on page 44 of the record.

No attack whatever was ever made nor is any attack now made on the assignment of the case to Judge Hunt. Petitioners do not consider it of enough importance to even have it printed in the record for this Court (R. 296).

Armed before trial with full factual information concerning the call on Judge Hunt,[3] which petitioners now assert is conclusive proof of actual prejudice, petitioners at the actual trial and up to this point in what has been rather extended litigation, have always and consistently relied upon a theory that Judge Hunt was disqualified only because the Missouri statutes relating to change of venue were applicable to contempt cases.

Chief defense counsel advised the trial court at the time of trial that "the documents handed to you (the

[3] The implication that Judge Hunt saw anyone beside Everage in the presence of his attorney, Maitland, is without support in the record or otherwise. Senator Sawyers' affidavit to the effect that before trial, he had "learned that said Hunt had secretly interviewed *witnesses*, including Everage," must be taken to mean that he was informed by someone that there were other "witnesses." Obviously he did not think enough of that rumor even to try to ascertain whether or not it was true.

petitioners' Petition for Change of Venue (R. 40, 42, 47)) are in the form provided *by statute* for disqualifying the judge" (R. 45) "* * * those documents, so far as I could ascertain, will fit the requirements of *both statutes,* the civil and criminal. And it is that type of document that we handed you, claiming that Your Honor is disqualified to hear the case" (R. 46).

Upon being asked by Judge Hunt whether there was anything else beside the statutory applications, counsel replied in the negative (R. 46). The petitions were denied (R. 47). What actually happened at the trial is in sharp contrast with petitioners' current contention that they filed the petition for change of venue because they then believed that Judge Hunt "was not in a position to disregard what he had previously found in his investigation" (Pet. 4). No effort whatever was ever or has ever been made in any court to plead or to prove that Judge Hunt was *in fact* prejudiced against petitioners.[4]

After the petitions for change of venue were denied (R. 46, 47), petitioners litigated their "purgation by oath" theory (R. 273) through both the Kansas City Court of Appeals and the Supreme Court of Missouri (See pages 165 and 184 of typewritten transcript of Missouri Supreme Court) in prohibition proceedings before the case could come to trial on the merits.

After both those appellate courts had denied prohibition, the case was tried and evidence was submitted by the complainant to support the allegations of the complaint which alleged, in substance, that Osborne and Sympson, who were lawyers, and who served as the

[4] Neither Sawyers nor Waltner have ever testified at any stage in this case nor did Sawyers ever subpoena the transcript of the Everage-Maitland visit. Waltner has played like a jackal in the shadows of this case from the outset (R. 152, 153). We cannot see how his belated ex parte reve'ation of who telephoned whom adds anything to the case even if it were assumed to be true.

record and trial counsel for the plaintiff in *Burton* v. *Moulder,* together with James, another lawyer for the plaintiff, but not counsel of record, and Cabbell, Jones, and Everage, laymen, did confederate together and by actions, individually and collectively, did impede and obstruct the administration of justice by knowingly undertaking to present and by actually presenting the false testimony of Jones and Everage as witnesses for the plaintiff in the case of *Burton* v. *Moulder* when those two persons had never actually witnessed the accident out of which the lawsuit arose (R. 268-272). James and Everage had responded to the rule to show why the contemnors should not be punished for contempt by filing separate written responses in which each admitted his part in the plan (R. 268).

None of the contemnors, other than Everage, testified and no evidence was introduced in behalf of any of them (R. 269).

In the habeas corpus proceeding in the Supreme Court of Missouri, a full review upon the record and the transcript was afforded petitioners "by consent of the parties" (R. 268).[8]

The Supreme Court of Missouri disposed of petitioners' contention that contempt was neither pleaded nor proved by holding that "Osborne and Sympson, sworn officers of the court, and Cabbell, their alleged lay confederate, are

[8] Section 532.710, 532.410(3) and 532.440 of 1949 Missouri Revised Statutes and *White* v. *Hutton*, 240 S. W. 2d 193, 199, indicated that there was some doubt, in spite of *Ex Parte Creasy*, 243 Mo. 679, 148 S. W. 915 and *In re Howell and Ewing*, 273 Mo. 96, 200 S. W. 65, whether the Habeas Corpus Act would permit "inquiry into the sufficiency of proof to support the judgment." *Amici Curiae's* request that the Supreme Court of Missouri grant "the fullest type of review of the entire proceedings," was granted. This request was predicated upon *Amici Curiae's* recognition that the contempt power of a particular court is "perhaps nearest akin to despotic power of any power existing under our form of government," *State ex rel. Attorney General* v. *Circuit Court*, 97 Wisc. 1, 8, 72 N. W. 192, a case which *Amici Curiae* called to the attention of both the trial and appellate courts.

charged with procuring, coaching, rehearsing, causing and paying false witnesses to give perjured testimony in a court proceeding, for the purpose of impeding and obstructing the administration of justice. That such a sordid, reprehensible scheme and its execution would impede and obstruct the administration of justice cannot be gainsaid" (R. 278-279). "The sufficiency of the evidence need not be discussed at length. It speaks for itself; it substantiates the charge in the complaint, and was not denied. The trial judge heard and saw the witnesses. We cannot say he was not justified in adjudging petitioners guilty" (R. 280).

Petitioners' contention that they were denied a trial before an impartial judge was "predicated upon two grounds: (a) that the pleadings admit Judge Hunt was not impartial, and (b) that by the filing in the circuit court of an affidavit of each of petitioners, supported by affidavits of two reputable persons, as provided in § 545.660, R. S. Mo. 1949, Judge Hunt was divested of jurisdiction, and another judge should have been called in to try the cause" (R. 276).

The first ground, relating to the "admission" contained in the pleadings, was disposed of by the holding that "mere conclusions, nothing more," were alleged by petitioners and that "a demurrer does not admit mere conclusions of a pleader" (R. 277).

As to the second ground relating to the alleged applicability of Section 545.660 R. S. Mo. 1949, the Supreme Court of Missouri held:

> This case is presented here upon the record in the trial court. The only suggestion of prejudice made as to the trial court was the aforesaid affidavits, which stated the bald conclusion of each affiant that Judge Hunt would not afford him a fair trial. Such an ex parte affidavit constituted no proof whatsoever of

the conclusions therein stated. Neither did it, under the statute, § 545.660, disqualify him * * * It is applicable only to criminal cases.

"* * * We have carefully examined the entire record and have not found the slightest indication of any prejudice against petitioners or either of them. Throughout the trial the proceedings were conducted with the utmost concern for their rights. The evidence in the case presents no issue that in and of itself would tend to prejudice the judge. He was not aware that the alleged contemptuous acts were being committed until long after the trial of the Burton-Moulder case. The offense arises out of no colloquy or encounter with the judge that would tend to arouse his passion or ill will. The record presents no indication whatsoever that petitioners did not have a fair trial before an impartial judge (R. 277-278).

ARGUMENT

1. *Fisher* v. *Pace,* 336 U. S. 155, decided in 1948 (rehearing denied in 1949), is the most recent contempt case from a state court which this Court has reviewed.

That case involved a direct contempt and held that a summary conviction without further proof of facts and punishment accords due process. This Court there held that "historically and rationally the inherent power of courts to punish contempts in the face of the court without aid of jury is not open to question."

In support of that decision five cases are cited (see footnote 2, page 160 of 336 U. S.). *Ex parte Terry,* 128 U. S. 289 and *Re Savin,* 131 U. S. 267, are leading cases which respectively involved instances of direct and constructive contempts arising in lower federal courts. *Cooke* v. *United States,* 267 U. S. 517, another constructive contempt case from a lower federal court, in reliance on *Terry* and *Savin,* held that "due process of law * * * requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation * * *. This includes the assistance of counsel, if requested, and the right to call witnesses * * *."

Eilenbecker v. *District Court of Plymouth County, Iowa,* 134 U. S. 31, another of the cases relied on, is the leading case holding that the Fourteenth Amendment does not afford a trial by jury in a constructive contempt case pending in a state court. Mr. Justice Miller declared that "if it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it."

The fifth case cited in *Fisher* v. *Pace, supra,* is *Re Oliver,* 333 U. S. 257. That case, like *Eilenbecker,* involved

a state commitment for contempt. The due process clause of the Fourteenth Amendment was held to have been violated by a Michigan one-man grand jury judge because of the secrecy of the proceeding and because reasonable opportunity to be heard had not been afforded that contemnor. Mr. Justice Black for the majority acknowledged that the due process requirements for contempt cases had been correctly stated in the *Cooke Case* (see page 275 of 333 U. S.).

Cases such as *Nye* v. *United States,* 313 U. S. 33, and its progeny, must be laid to one side because, as stated by Mr. Justice Douglas, the Court was there dealing "only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power" (see page 50 of 313 U. S.). Likewise, cases such as *Bridges* v. *California,* 314 U. S. 252, are not apposite because they involve the application of the First Amendment, which, since *Gitlow* v. *New York,* 268 U. S. 652, is, by virtue of the Fourteenth Amendment, applicable to the states as well as the federal government.

So far as the exercise of contempt power is concerned, the problem of whether the Fourteenth Amendment makes the Sixth Amendment applicable to the states is not involved because it is clear that even if applicable, the Sixth Amendment does not guarantee a jury trial to a contemnor in a constructive contempt proceeding. See *Myers* v. *United States,* 264 U. S. 95, 104-105; *Blackmer* v. *United States,* 284 U. S. 421, 440, and *United States* v. *United Mine Workers of America,* 330 U. S. 258, 298, and footnotes 30, page 364, and footnote 33, page 267, of dissenting opinion of Mr. Justice Rutledge.

Cases such as *Ex Parte Hudgings,* 249 U. S. 378, and *Matter of Michael,* 326 U. S. 224, are not involved because obstructions of justice far beyond mere perjury are

obviously involved on the facts in the case at bar. *Clark* v. *United States,* 289 U. S. 1.

The only suggestion that a jury trial might be required in any contempt case is found in Mr. Justice Black's dissent (joined by Mr. Justice Douglas) in *Sacher* v. *United States,* No. 201, October Term, 1950, decided March 10, 1952. That case involved a lower federal court, and Mr. Justice Black was careful to set forth the portions of the Constitution upon which he based his dissent. Those provisions, Article III, Section 2, and the Sixth Amendment, are applicable only to the federal and not to the state governments.

No Justice of the Supreme Court of the United States in any of the most numerous cases involving contempt of court, either federal or state, has ever intimated, even in a dissenting opinion, that *procedural* due process, required by the Fifth or Fourteenth Amendment, includes a trial by jury. *Fisher* v. *Pace* and the cases relied upon therein are correctly decided and conclusively foreclose petitioners' claim that they were entitled to a trial by jury.

Rule 42 of the Federal Rules of Criminal Procedure, adopted by this Court December 26, 1944 (326 U. S. App. IV), provides that a "defendant is entitled to a trial by jury in any case *in which an act of Congress so provides,*" thereby recognizing that such right is not constitutionally guaranteed. In May, 1950, the Supreme Court of Missouri appointed an advisory committee for the purpose of ultimately promulgating Rules of Criminal Procedure pursuant to Article V, Section 5, of the 1946 Constitution of Missouri.

Missouri Rule 35, most recently adopted by the Supreme Court of Missouri on April 14, 1952, is based on Federal Rule 42 and is almost identical therewith. The procedure followed in this case, although not regulated by either

rule, was entirely consistent with both because both are essentially restatements of the common law rules of decision of this Court as announced in the above cited cases.

2. This Court has determined that procedural due process is not denied because a contempt proceeding is tried before the judge in whose court the contempt was committed. The rule of decision in Missouri before the decision in the case at bar actually prohibited transfer. *State ex inf. Crow* v. *Shepherd,* 177 Mo. 205, 237, 76 S. W. 79.

The decision in the case at bar did for the Missouri practice what the decision of Chief Justice Taft in *Cooke* v. *United States,* 267 U. S. 517, did for the federal practice. The doctrine of the *Cooke Case,* permitting transfer, is now codified in Rule 42 of the Federal Rules of Criminal Procedure. Missouri Rule 35 does likewise for all future Missouri cases.

But the federal or a state policy of permitting transfer is not dictated by any constitutional mandate. Nor is it a denial of procedural due process for a federal judge to hear and decide a constructive contempt proceeding that arose in the court over which he presides. See *Higgins* v. *United States* (C. A. D. C.), 160 F. 2d 223, certiorari denied, 331 U. S. 840. Petitioners' claim that a state court judge is constitutionally prohibited in the same situation is untenable.

The considerations which permit either a federal or a state judge to transfer a contempt case which arose in his court do not come into play unless the contempt charged involves personal disrespect to or personal criticism of the particular judge involved. That consideration was not involved in the *Higgins Case* nor is it involved in this state court case.

A particular judge, federal or state, cannot be driven from a contempt case by the mere allegation of a conclusion of law, unsupported by factual support, either in the pleadings or in the record, to the effect that such a judge was "prejudiced" against the contemnor. A state rule of decision which requires that allegations of fact, as distinguished from conclusions of law, must be properly pleaded, is not a denial of due process. Cf. *St. Louis, Kennett, & Southeastern Railroad Company* v. *United States,* 267 U. S. 346, 349, and cases there cited.

United States v. *Woods,* 299 U. S. 152, *Frazier* v. *United States,* 335 U. S. 497, 503, 513, and *Dennis* v. *United States,* 339 U. S. 162, 168, are analogous. Those cases point out that the law permits full inquiry as to the actual, as distinguished from an implied, bias of prospective jurors and that the assertion of vague and general conclusions by counsel in the trial court cannot be vitalized into reality by making assignments of error in an appellate court (see page 514 of 335 U. S.). Had petitioners actually felt that Judge Hunt was in fact prejudiced against them they would not have been content to rely upon the obviously vain hope that implied prejudice could be established on the theory that a contempt proceeding was a "criminal cause" within the meaning of Missouri statutes regulating changes of venue in criminal cases. Nor would they have failed to have asked for the appointment of a special commissioner in the habeas corpus proceeding in the Missouri Supreme Court pursuant to the well-established Missouri practice had they actually believed they stood the most remote chance of proving actual prejudice. They did neither.

Two decisions of this Court, both written by Mr Justice Holmes, lays any question at rest. *United States* v. *Shipp,* 203 U. S. 563, was a constructive contempt case originat-

ing in this Court. This Court had ordered all proceedings stayed at the time it had allowed an appeal from the Federal Circuit Court in Tennessee's decision which had denied relief by habeas corpus to a prisoner under sentence of death by a state court in Tennessee. The contemnor was charged with abetting a mob that lynched the defendant, thus preventing this Court from hearing the appeal. In support of the doctrine of purgation by oath (a notion rejected in the *Shipp Case* and finally relegated to "its place with ordeal and wager of law and trial by battle among the dimly remembered curios of outworn modes of trial" by Mr. Justice Cardozo in *Clark* v. *United States,* 289 U. S. 1), the contemnor "suggested that the court is a party" to a contempt case and therefore disqualified. Mr. Justice Holmes held that "the court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."

In *Patterson* v. *Colorado ex rel. Attorney General,* 205 U. S. 454, this Court reviewed the judgment of the Supreme Court of Colorado which had affirmed a constructive contempt conviction of that court. In that case Mr. Justice Holmes noted that "it is objected that the judges were sitting in their own case." That argument was disposed of by the citation of the *Shipp Case* and the statement that "the grounds upon which contempts are punished are impersonal."

Judges in general are opposed to actions that constitute contempt but they are also generally opposed to rape, murder and arson. Neither a general feeling of opposition to law violations nor a particular feeling against the commission of contempts in the court over which a judge might preside is either a violation of the Federal Con-

stitution or a ground of constitutional disqualification to try a particular contempt case.[6]

This Court pointed out in *Tumey* v. *Ohio,* 273 U. S. 510, 523, that "all questions of judicial qualification may not involve constitutional validity. * * * Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." In *Federal Trade Commission* v. *Cement Industry,* 333 U. S. 683, 702-3, Mr. Justice Black well stated that "neither the Tumey decision nor any other decision of this court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."

Certainly those decisions establish that a state court judge is not constitutionally disqualified to try a contempt case that arose in his court merely because a future contemnor, without any invitation of the judge and in the company of and on the advice of his personal attorney, called on the judge to advise him of what had happened in a case in which he had been involved. The suggestion that the Constitution of the United States had been violated by Judge Hunt's presiding obviously is a "mere afterthought" (Mr. Justice Holmes' description of the attempt to revive the doctrine of a purgation by oath in the *Shipp Case*).

The record shows that contemnors attempted to remove Judge Hunt on the sole theory that the state statutes relating to change of venue were applicable to contempt

[6] One could just as well argue that Mr. Justice Holmes displayed a prejudiced attitude in the constitutional sense, when he wrote his friend Pollock that this Court, in the *Shipp Case*, "had to take steps to deal with the contempt of our authority—which we have done, in your chancery's delightful phrase, *with all deliberate speed.*" I. Holmes-Pollock Letters, 151-152.

cases (R. 45-46). No effort whatever was made either in the trial court or in the Supreme Court of Missouri to either allege fact or to prove that Judge Hunt was disqualified on any ground other than one implied from the alleged applicability of the Missouri statutes (R. 46).

The Supreme Court of Missouri correctly disposed of the matter by holding that "we have examined the entire record and have not found the slightest indication of any prejudice against petitioners or either of them. Throughout the trial the proceedings were conducted with the utmost concern for their rights. * * * The record presents no indication whatsoever that petitioners did not have a fair trial before an impartial judge" (R. 277). *Barrington* v. *Missouri,* 205 U. S. 483, 485, suggests the absence of a Federal question under these circumstances.

3. Various other contentions which are threaded throughout the petition and brief do not require extended discussion. The suggestion that Judge Hunt was "the judge who has been offended" (Pet. 5) and the complaint that "it is not right to require a judge who thinks he has been insulted to try a case against a person whom he thinks has insulted him" (Pet. Br. 4) are not consistent with the situation presented by the record. The contempt in this case did not involve a personal attack on the judge. The acts and actions which consisted contempt in this case were directed against the whole fabric of the administration of justice in that false testimony was knowingly procured and presented to the jury.

Petitioners' insistence that the other contempt adjudications are "substantially identical" (Pet. 5) to the one involved in this case and their statement that "Respondents told this court * * * that * * * Matt Jones was shot and killed" (Pet. Br. 4) are matters which petitioners chose to inject into this case in connection with their

motion for an extension of time. When matters outside the record are discussed, they should be discussed accurately. The other contempt proceedings and the other criminal cases, involving still other lawyers and involving, among other things, jury tampering and subornation of perjury, simply are not identical. Matt Jones, a co-contemnor adjudged guilty together with the petitioners, immediately before the trial of one of the other contempt proceedings, was not "shot and killed." He was found dead in the Missouri River with a couple of concrete blocks chained to his legs. Petitioner Osborne was not cited for contempt for the murder of Matt Jones (but cf. *United States* v. *Shipp,* 203 U. S. 563); he was indicted for first degree murder and now awaits trial. Petitioners' attempt to create the impression that they were not indicted in the criminal courts by questioning whether a lawyer "shall be tried by contempt *or* the matter certified to a grand jury for criminal prosecution" (Pet. 6), and by arguing that "the charges against petitioners were purely criminal and the judge should have submitted what information he has secured to the grand jury, where petitioners *could* have been indicted if there were grounds for indictment" (Pet. Br. 3). The fact is that two special grand juries were convened and that petitioners have in fact been indicted. (See Vol. 72, No. 193, page 1 of *The Kansas City Star* for March 28, 1952, for summary of current status of the various other contempt and criminal cases.)

The contention that petitioners' acts must *either* be subornation of perjury *or* contempt, but not *both,* is answered by Mr. Justice Brandeis in *Jurney* v. *MacCracken,* 294 U. S. 125, 151-152, and the cases cited therein.

4. One week after respondent was served with a typewritten copy of the petition for certiorari, we were served with a typewritten copy of what is called a "Supplemental Petition" for certiorari filed on behalf of petitioner Cabbell.

We believe that this brief, written before the receipt of the supplemental petition, adequately covers the points reargued in that document. Although the same counsel appears on both petitions, we do not wish to raise any question as to whether the supplemental petition is in compliance with this Court's rules. We would, however, like to have the opportunity of resisting the filing of any other papers that are not contemplated by the rules.

5. This case is not of any importance to either the Bench, the Bar, or the public. It involves a "sordid, reprehensible scheme * * * to impede and obstruct the administration of justice" (R. 279). The law of contempt is not in confusion. The State of Missouri should not be summoned to answer for state judicial action taken in a case such as this when that action was consistent with what this Court has heretofore uniformly held to be in accord with the requirements of the Fourteenth Amendment.

As the concurring opinion in *Gallegos* v. *Nebraska,* No. 94, October Term, 1951, held, if a new concept of constitutional law in the field of contempt is "to be converted into a constitutional limitation upon the states, the facts in this case would afford a poor foundation for it."

CONCLUSION

The judgment below is correct and in accordance with all announced rules of contempt proceedings. We therefore respectfully submit that the petition for certiorari should be denied.

JOHN W. OLIVER,
HORACE F. BLACKWELL, JR.,
ALBERT W. THOMSON,
Amici Curiae
Attorneys for the Respondent.

HENRY H. FOX, JR., Prosecuting Attorney
of Jackson County, Missouri,
Of Counsel.

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CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 717.

ALFRED H. OSBORNE, ROBERT B. SYMPSON AND PHIL CABBELL, PETITIONERS,

VS.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

PETITIONERS' REPLY BRIEF.

JOHN T. BARKER,
Macon, Missouri,
AMOS T. HALL,
107½ Greenwood Street,
Tulsa, Oklahoma,
Counsel for Petitioners.

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Black's Law Dictionary, Second Edition, pages 152, 1116 ..... 5, 6

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PETITIONERS' REPLY BRIEF.

STATEMENT.

Respondent never took issue with the Petitioners that the trial Judge Honorable Thomas R. Hunt, conducted an investigation and convinced himself as to the guilt of Petitioners before he caused the citations for contempt to be

issued. At page 5 of their brief they say that such statements are contrary to the record but on page 6 they say that Petitioners knew all the time that Judge Hunt had conducted such an investigation and knew all the facts and circumstances. It is true that State Senator Sawyer in his affidavit does say that he went to Judge Hunt before the contempt hearing, and told him he understood that a secret investigation had been made and statements taken and he would like to have a copy of said statements for the petitioners. But that Judge Hunt refused to give him a copy of the statements he had taken in his secret chambers. So, petitioners did not know what statements Judge Hunt had taken and did not see said statements, because Judge Hunt would not allow them to.

I.

Petitioners Were Charged with Bribery and Subornation of Perjury Outside of the Presence of the Court. Such Charges Are Not Triable by Contempt.

The complaint for contempt issued against the petitioners charges:

> "That, in the course of preparing for and during the trial of the case of *Burton* v. *Moulder* (a personal injury suit tried in Division No. 4, of the Circuit Court of Jackson County, Missouri, September 27-30, 1950, before the Honorable Thomas R. Hunt, Judge, in which petitioners Osborne and Sympson were attorneys for the plaintiff) * * * (all of the accused) did confederate and did unlawfully act to impede and obstruct the administration of justice by * * * undertaking to present to whatever jury that might be drawn for the actual trial of the case, and by actually presenting, the testimony of two alleged witnesses who in truth and fact had never actually witnessed any of the occurrences out of which the lawsuit of *Burton* v. *Moulder* arose * * *" (R. 1, 2).

"Each of the named contemnors had full knowledge of the aforesaid plan and the individual conduct of each, standing alone, constituted an action which, was designed to and which did impede and obstruct the administration of justice" (R. 2).

"That the accused '* * * did individually act to impede and obstruct the administration of justice * * *."

That "* * * the conduct (of the accused) tended to interfere and did in fact * * * impede the administration of justice * * * in this court" (R. 2).

The only witness who testified against petitioners was Vernon Everage (R. 68). At the trial he testified as follows:

"Q. Did you testify as a witness in the trial of a case, Burton against Moulder?
(fol. 230) A. Yes, I did.

* * * * * * *

Q. Was your testimony that you gave in that case true or false?
A. False.
Q. Were you paid money to give that false testimony?
A. Yes, I was.
Q. By whom were you paid?
A. Mr. Osborne.
Q. Mr. who?
A. Al Osborne.
Q. Mr. Al Osborne. Is he a practicing lawyer in Kansas City?
A. Yes, he is.
(fol. 231) Q. How much were you paid?
A. One hundred dollars.
Q. One hundred dollars?
A. Yes, sir."

on page 85 of the transcript of the Record and in testifying that he was paid one hundred dollars outside of the Court-

room to testify falsely in the damage suit of *Burton* v. *Moulder* he said:

"Q. All right. Did anything else occur in the witness room that afternoon before you testified, Mr. Everage, that you haven't told about?

A. Yes. I was given the hundred dollars that evening.

Q. By whom?

A. By Mr. Osborne.

Q. And state again where it was.

A. In the witness room.

Q. Was that hundred dollars in cash or by check?

A. It was cash.

Q. Was it in a bill of one denomination or more than one bill?

A. One denomination.

Q. What disposition did you make of that one hundred dollar bill?

(fol. 257) A. I paid a bill at the Palace with it.

Q. Palace Clothing Company?

A. Palace Clothing Company.

Q. And individual bill of your own?

A. Yes, sir.

Q. When did you make that payment?

A. Day after I testified.

Q. Do you remember what day of the week it was?

A. It was on a Saturday."

* * * * * * *

on pages 157 and 158:

"* * * Q. Where was it that Osborne paid you this $100 or gave you the $100 you testified about?

A. In the witness room.

Q. And which witness room, now?

A. I don't know which one it was.

Q. Was that after you testified?

A. No, it wasn't.

Q. Before you testified?

A. Before.

Q. Before you came up on the elevator?

(fol. 371.) * * *

* * * * * * *

Q. When you testified, how long before was it that he gave you that before you testified?

A. He gave it to me on a Thursday evening.

Q. He gave you the $100?

A. That is right.

Q. Thursday night?

A. That is right.

Q. Where?

A. In the witness room.

Q. What time that evening?

A. Oh, I don't know, sometime after five o'clock, I imagine."

* * * * * * *

It is clear therefore that these two lawyers and this Negro layman were charged with bribing Witness Everage to testify falsely.

Black's Law Dictionary, Second Edition, at page 152, defines bribery as thus:

> "BRIBERY. In criminal law. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity."

It was also subornation of perjury. That is defined by Mr. Black at page 1116:

> "SUBORNATION OF PERJURY. In criminal law. The offense of procuring another to take such a false oath as would constitute perjury in the principal."

Respondent tells the Court at page 20 of its brief that adverse Witness Matt Jones was thrown in the Missouri River and killed and that petitioner Osborne was not cited by this Judge for contempt for the murder of Matt Jones but was indicted by a grand jury. Why indict Osborne for murder for the alleged killing of an adverse witness and not indict him for bribery and subornation of perjury for paying a witness to testify falsely. If petitioner Osborne can be subjected to "trial by contempt" for bribery and subornation of perjury, he can certainly be subjected to "trial by contempt" for murdering an adverse witness to keep him from testifying. We think this statement of Respondent admitting that Osborne was indicted for the murder of a witness to keep him from testifying, clearly shows that he should likewise have been indicted for bribing a witness to testify in his favor if he did so. Can one be tried one way for bribing a witness to testify falsely, and another way for killing a witness to keep him from testifying. These petitioners were not guilty of contempt, if guilty of anything they were guilty of bribery and subornation of perjury. This Court should not enlarge "trial by contempt" but should curtail it and give a person his constitutional rights to a trial by jury for the commission of a felony.

Constitutional questions were raised in the first pleading of petitioners and in every pleading thereafter (R. 5-9-200-209-238-272).

II.

The Testimony of the Only Witness Everage, Is Incredible.

He testified that he was paid one hundred dollars to testify falsely in the damage suit of *Burton* v. *Moulder* (R. 68) that the one hundred dollars so given him was in cash and was a bill of one denomination (R. 85-86); that he paid a bill at the Palace Clothing Company with it (R. 86). A one hundred dollar bill would naturally attract attention when changing or showing it. He does not say he showed this one hundred dollar bill to anyone. The credit man for the Palace Clothing Company testified that Everage made a payment of $10.55 on the 30th day of September, 1950, but does not know in what denomination Everage made the payment. Whether it was a large bill or a small bill (R. 161-163-164). The Witness' wife, Helen Everage, testified that her husband told her that he had received one hundred dollars but he did not show her the one hundred dollar bill (R. 166-168). Isn't it very peculiar that this man received a one hundred dollar bill for testifying falsely and told people about it but never showed them the one hundred dollar bill and never stated where he changed it, or where he spent it? Had this man been testifying truthfully he would have stated that he showed his wife a one hundred dollar bill and that he changed it when he paid a bill or made a purchase. The fact that he was silent about showing this one hundred dollar bill to anyone and also silent about saying what he did with it is very strong evidence that he never had a one hundred dollar bill. His story is beyond belief.

III.

Petitioner Phil Cabbell Is a Negro Layman and Charged with Bribery and Subornation of Perjury.

He was entitled to a trial by jury instead of a trial by contempt.

It was charged that Osborne, Sympson, James, Cabbell, Jones and Everage "did act to impede or obstruct the administration of justice" (R. 6), only Osborne, Sympson and Cabbell appear in this case. Osborne and Sympson were Attorneys at Law, trying the damage suit of *Burton* v. *Moulder*. Cabbell was a negro layman who is alleged to have aided them in inducing Everage to testify falsely (R. 7).

It is stated in the original brief that Cabbell was only present near the Everage home when Everage talked to Osborne and Sympson but Cabbell did nothing and said nothing. He was simply present (R. 72-73-74-75).

Osborne and Sympson were Attorneys at Law and officers of the Court. It may be claimed that the Court had some kind of disciplinary control over them. But the Court certainly had no disciplinary control over layman Cabbell. They were all charged with bribery and subornation of perjury and should have been tried by jury for the commission of a criminal offense. The damage suit was tried in 1950 (R. 1-2) and was an orderly trial and no disturbance of any kind. It had long been finished when in April, 1951, this citation for criminal contempt was filed against the petitioners (R. 1-2). It may be that the testimony of Witness Everage if it was false, produced a wrong result at the trial of *Burton* v. *Moulder* but there was certainly no obstruction to the administration of justice, or any delay to the trial. Perjury may produce a wrong result but it is not contempt. It is perjury and must be prosecuted before

a jury as perjury, so is subornation of perjury a crime to be punished by trial by jury. So is murder a crime to be punished by trial by jury not "trial by contempt."

CONCLUSION.

The testimony of only one witness, Vernon Everage, convicted these two lawyers and this layman. He had been a witness in a damage suit and months after the trial had gone to the Judge's chambers and gave the Judge a written statement *ex parte*, that he had lied on the witness stand. The Judge took his statement outside of the presence of petitioners and without their knowledge before the trial for contempt. He refused to allow them to even see the statement which he had taken from Witness Everage (Affidavit of Senator Sawyer in Appendix of original brief).

The trial judge who had conducted this secret investigation was told that he had to try the contempt case and could not transfer it to another Judge (R. 44-47).

Apparently acting upon the advice that he could not call in another one of the Nine Circuit Judges in the County or call in a Judge from another part of the State as the law provides, the Judge who made the investigation proceeded to try the contempt case himself. He refused to disqualify himself although asked to. Had he thought he had a right to call in another Judge he probably would have done so, but having been advised by his counsel that he could not call in another Judge although he knew all about the case and although he had investigated it, he proceeded to try it which was a denial of due process under the 14th Amendment to the Constitution of the United States. Petitioners did not have a fair trial before a fair Judge.

We respectfully ask that the petition for Certiorari be granted in order that the rights of these two lawyers and this layman be protected.

Respectfully submitted,

JOHN T. BARKER,
Macon, Missouri,
AMOS T. HALL,
107½ Greenwood Street,
Tulsa, Oklahoma,
Counsel for Petitioners.

MAY 31 1952

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 717.

ALFRED H. OSBORNE, ROBERT B. SYMPSON AND PHIL CABBELL, PETITIONERS,

VS.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

JOHN T. BARKER,
Macon, Missouri,
AMOS T. HALL,
107½ Greenwood Street,
Tulsa, Oklahoma,
Counsel for Petitioners.

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PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

At this time come the petitioners Alfred H. Osborne, Robert B. Sympson, and Phil Cabbell and ask the court to set aside its order denying petitioners' application for a writ of certiorari addressed to the Supreme Court of Missouri for the following reasons:

First, because petitioners' civil rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States have been denied:

a. They were sentenced to jail by a judge who had conducted a secret grand jury investigation and determined their guilt before trial.

b. Under the Fourteenth Amendment to the Constitution of the United States they were entitled to a fair trial before a fair judge and this they did not get.

c. They were charged with bribery and subornation of perjury committed outside of the courtroom, and were entitled to a trial by jury instead of a trial by contempt.

d. The only witness who testified against them was unworthy of belief and his testimony was not sufficient to convict anyone.

e. The gravest kind of an injustice has been done to petitioners and a re-examination and a reconsideration should be made of this short record in order to protect the civil rights of these petitioners.

f. The trial judge would have undoubtedly called in another judge when requested, had he not been told by his lawyers that he could not do so—that he had to try them whether prejudiced or not.

Wherefore petitioners respectfully urge this court to re-examine and reconsider their application for certiorari as there is no other case in the books sustaining a sentence of imprisonment in such a case.

Respectfully submitted,

JOHN T. BARKER,
Macon, Missouri,

AMOS T. HALL,
107½ Greenwood Street,
Tulsa, Oklahoma,

Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

POINTS AND AUTHORITIES.

I.

Petitioners were sentenced to prison in violation of their constitutional civil rights. This court has never yet approved a sentence of imprisonment by a prejudiced judge. There is no case in all the law books like this one. It stands alone.

II.

Since when in this country has bribery, perjury, and murder been triable by contempt without a jury? This decision sending these men to prison announces an astounding doctrine which will shock all jurisprudence.

III.

Judge Hunt was advised by his counsel that he could not call in another judge to hear the contempt charges. This erroneous advice undoubtedly kept him from calling in another judge.

ARGUMENT.

I.

Petitioners were sentenced to prison in violation of their constitutional civil rights. This court has never yet approved a sentence of imprisonment by a prejudiced judge. There is no case in all the law books like this one. It stands alone.

This court should re-examine this record and if it will do so it will find that petitioners were sent to jail by a judge who had already determined *their guilt before trial.* There just cannot be any question about this as we will show.

On page 16 of petitioners' original brief is set out an affidavit which is not questioned by Senator William Orr Sawyers of St. Joseph, Missouri, who says:

> "That, in May, 1951, and before the trial of said contempt proceeding before said Hunt in June, 1951, affiant and Senator John Hosher, of Savannah, in Andrew County, Missouri, went to the chambers of said Thos. R. Hunt at which time affiant told said Hunt that affiant had learned of said interviews and the transcription made thereof, and requested said Hunt to furnish affiant with a copy of such transcriptions at affiant's expense. That, thereupon, said Hunt became quite red-faced, and apparently embarrassed, and stated that said interviews were *his private investigation*, that they were not part of any public proceeding, that said Osborne was not entitled to such transcriptions, and said Hunt very curtly refused *affiant's request* for copies of such interviews."

And on page 4 of the same brief petitioners quote from respondent's suggestions in opposition to the extension of

time filed as a record in this court on the eighth day of April, 1952:

> "The record shows that contemnor Everage did call on Judge Hunt in chambers accompanied by his own lawyer, to give the court information about the case of *Burton* v. *Moulder*."

And on page 6 of the brief of respondent filed in this court respondent admits that the affidavit of Senator Sawyers is true by saying:

> "The affidavit of Senator Sawyers, attached to petitioners' brief, shows that petitioners were fully informed of the fact and circumstances of Everage's call long before trial."

So it cannot be questioned that:

a. The trial Judge Thomas R. Hunt conducted a secret investigation in his chambers and determined the guilt of petitioners before the contempt trial.

b. Petitioners knew nothing about said secret investigation but heard that one had been conducted and tried to get the judge to give them a transcript of the statements taken. This he refused.

c. Petitioners then filed a motion alleging prejudice and asked that an impartial judge be called in to try them but the judge was advised by counsel that he could not call in another judge, but had to hear the case himself although he had formed an opinion as to the guilt of petitioners.

d. This judge should have disqualified himself although no allegation of prejudice had been made. He knew that he could not give these men such a fair trial that they were entitled to under the due process clause of the Fourteenth Amendment.

II.

Since when in this country has bribery, perjury, and murder been triable by contempt without a jury? This decision sending these men to prison announces an astounding doctrine which will shock all jurisprudence.

The doctrine announced in this decision that a man charged with bribery, perjury, or murder may be tried by contempt without a jury is one of the most astounding doctrines ever announced in the history of this court. We respectfully state that we do not believe this court wants any such doctrines announced. It has always been the law that one charged with bribery, perjury, or murder should be given trial by jury as guaranteed by the Fourteenth Amendment to the Constitution of the United States. There just isn't any authority justifying a trial by contempt for such charges. Suppose a witness is killed to prevent him from testifying in a contempt case? Can one be charged and tried by contempt and sentenced to the electric chair upon that? The mere asking of this question demonstrates its absurdity. We feel sure that if this court will re-examine this question it will not sanction trial by contempt for murder, bribery, or perjury.

III.

Judge Hunt was advised by his counsel that he could not call in another judge to hear the contempt charges. This erroneous advice undoubtedly kept him from calling in another judge.

Judge Hunt who sentenced these men to prison knew, of course, that he had conducted a secret investigation of his own and had determined their guilt. Undoubtedly he would have called in another judge to hear the charges had he not been advised by the three lawyers he had appointed

to investigate the matter, that he could not do so. They told him that even though he was prejudiced, he had to try the contempt case. That he had no discretion about the matter and could not call in another judge even though he felt that he should (R. 44-45-46).

The trial judge, Hon. Thomas R. Hunt was wrongfully advised by his counsel and for that reason denied petitioners a change of venue as requested, and refused to call in another judge as requested. Again we say, has it come to a point in this country that a judge who has conducted an investigation of his own and determined the guilt of a person, cannot disqualify himself. This also is an astounding doctrine and should not receive the sanction of this court. Any judge with knowledge of the facts and guilt of a person would naturally not want to try such person, but here the judge was told that he had to try petitioners. That he could not call in another judge although requested to do so. This court should re-examine this question and not sanction the practice of a prejudiced judge trying a person in contempt when many other judges are available.

CONCLUSION.

Petitioners believe that they should not have been tried, as they were, by a judge who was prejudiced against them, and who had conducted a secret star chamber investigation of them. This is undoubtedly what happened. There just cannot be any question about it. The record is as clear as the noon day sun. And the reason is also clear. This judge was advised by his counsel that he had to try these petitioners even though he had conducted a secret investigation in his chambers as to their guilt. He was told that he could not call in another judge as requested. So, this record shows that these men were convicted and

sentenced to jail by a judge who had secretly determined their guilt before trial. Will this court allow such a conviction to stand? We do not believe so.

Respectfully submitted,

JOHN T. BARKER,
Macon, Missouri,
AMOS T. HALL,
107½ Greenwood Street,
Tulsa, Oklahoma,
Counsel for Petitioners.

CERTIFICATE.

I hereby certify that the above and foregoing petition for rehearing and brief in support of same is made in good faith and not for delay, and because I believe that petitioners have not had a fair trial guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

JOHN T. BARKER,
Macon, Missouri,
Counsel for Petitioners.